1977

Future Roles for Lawyers: Reflections on Crossing the Bar

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ADDRESS

FUTURE ROLES FOR LAWYERS: REFLECTIONS ON CROSSING THE BAR

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SOMETIME AGO THE *New York Times* reported that Erwin Griswold — former Dean of the Harvard Law School, former President of the American Bar Foundation, former Solicitor General of the United States, and one of my own mentors and friends — was asked whether all private lawyers should donate some of their time and talents to serving the poor. "Should carpenters build houses free?" he responded.[1] The question was obviously intended as rhetorical, but in view of Mr. Griswold's stature in the legal profession his analogy deserves serious consideration, and his views deserve a serious response. My comments attempt to provide that response, in the context of some thoughts about the future roles of lawyers.

My assumption, of course, is that there are at least some roles for us in the future, though no one can be certain that this assumption is sound. China, after all, gets along without any lawyers. Perhaps in the future we will too, but I'm willing to pamper our professional egos and accept the assumption.

A more difficult hurdle is context. The legal profession is one part of the legal system. That system includes legal rules, institutions to apply those rules, parties who are involved in that application, as well as lawyers and officials who facilitate contacts between the parties and institutions. Each part of the legal system affects the other parts, and each part will certainly change over the next century. More generally, there will be changes in the economic, political, social, and cultural environments in which the legal system operates, and those changes will directly affect each aspect of the legal system, including the legal profession.

Without attempting to be all-inclusive, the following seven basic changes seemed fairly predictable to a conference I directed recently on law and the future:[2]

1. The law will become more pervasive as society becomes more complex and as government intercedes increasingly in previously consensual relationships. Particularly to the extent that the rules governing these developments are not the products of shared experiences within small

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[1] Oelsner, *Lawyers and Ethics: How Much Help to the Poor*, N.Y. Times, Aug. 22, 1976, § 4 (The Week in Review), at 18, col. 1.

[2] Brandel & Murphy, *Law in the Future: What are the Choices?*, 51 CAL. ST. B.J. 287 (1976).

communities, they will require the services of understanders and implementers — most often lawyers. The demand for legal services will, therefore, increase.

2. The substance of the law will change more rapidly as society reflects changes at an accelerating rate. Institutions will be created to facilitate rapid change, and lawyers must inevitably assume an active role in those new institutions.

3. The adversary process will decline in significance as a means to settle disputes, especially in matters that do not involve government as one of the parties.

4. Resources will continue to become more scarce, and individual rights and decisions will be increasingly restricted in favor of state planning.

5. The substance and procedures of law among the states will become more uniform, in part because of increasing federal action, but also because the states will have more similar needs.

6. Government will continue to promote social, economic, and educational equality.

7. The public demand for cost-efficient mass-delivery systems to provide legal services will continue to grow at an expanding rate.

Changes other than these will certainly occur, some perhaps even more important, but nothing at all can be said about the future if all possible environmental permutations are taken into account. Attractive as the option of silence is, I'm in too deep to accept it, so please add a set of massive caveats to my predictions. Recognizing that the line is thin between fortunetelling, which may still be a crime in my home state of California, and prediction, which is an essential predicate to planning, let me try to walk the line and possibly to stimulate your thinking along the way.

Four key areas seem to merit comment. First, the character of lawyering tasks. Second, the character of regulation of the legal profession. Third, the character of the professional obligations of lawyers — why those obligations extend beyond the public responsibilities of carpenters. And finally, the character of law training. At the outset, a massive chicken and egg problem should be recognized. For each of these clusters of questions affects directly the other three. But let me procede in the order indicated, with a recognition of the close interrelation of the four areas.

The Character of Lawyering Tasks

It seems inevitable that the organizational forms by which legal services are provided will change substantially in the future, and probably in the relatively near future. The current prototype is the individual practitioner providing individual service on the basis of an individually negotiated fee. This cottage industry mode has little to recommend it for the mass of legal concerns facing most people most of the time.

A variety of new techniques will be fashioned to aggregate common and recurring legal problems of average citizens and then to deal with the

aggregates. Legal services delivery will shift toward new forms of collective care. Group and prepaid plans and legal clinics are current examples — ones that are now expanding rapidly in spite of substantial initial resistance by the organized bar. Our profession is being carried kicking and screaming toward the aggregation and collective-service era, but that era is surely coming. And the shift will have substantial consequences for the character of legal practice.

Signs are already clear on the horizon that mass production is coming. Indeed, in many spheres it is already here. One needs only to walk into any neighborhood legal services office to see the indications.

These offices around the country are charged with attempting to provide civil legal assistance to those who live below poverty standards. For poor people, a legal problem too often involves a crisis of survival. A faulty car may mean unemployment unless the dealer makes good on a promise that the car was in good condition. A dispute with a landlord may mean no housing at all, and the denial of social security benefits may mean nothing to eat.

Lawyers and paralegals in legal services offices struggle to aid in 300, 400, or even 500 matters a year — crippling caseloads. Only by designing techniques of mass production whereby relatively common and recurring concerns can be dealt with wholesale is there any chance of even beginning to handle them. As a result, scores of those techniques have been developed. Inevitably, these arrangements are spilling over into the private sector of our profession.

Two examples may be helpful. First, almost all legal services offices today use many paralegals. By the end of this century, it seems likely that the numbers of non-lawyer and non-clerical personnel who participate in legal services delivery will exceed the numbers of lawyers. Economic pressures require the delegation of tasks to persons who are specialized, and who can perform those tasks at lower costs than all-purpose lawyers.

This process is already well underway in legal services offices, and in many private law firms as well. Paralegals must currently work under the supervision of attorneys, but before long separate organizations of legal technicians can be expected to develop, similar to those in the medical and dental fields. Without being precisely certain what are the legal counterparts of medical or dental technicians, they will probably soon emerge.

Second, the technological revolution has finally invaded lawyers' offices, and it will not stop. Legal services programs currently use word-processing machines to reduce personnel costs, and many employ a vast array of devices to retrieve and print material at high speeds. In the future, documents and entire libraries will be stored in computer memory banks and on microfiche with low cost retrieval and storage resulting. Computerized research is already a regular, though expensive, part of many Wall Street firms and other legal organizations. It will soon become standard equipment for all lawyers.

The range of problems that will emerge with these technological developments will be adequate to keep batteries of lawyers busy for

decades grappling with the conflicts, confidentiality, and evidentiary issues involved. We can hope, though not be optimistic, that our profession will take an encouraging lead in this area, rather than being dragged forward with its usual nostalgic reminiscences of Mr. Tut.

Mr. Tut, for those few who have forgotten, and those many more who never knew, was a sole practitioner of extraordinary skill whose exploits filled the pages of *The Saturday Evening Post* for years, thanks to the able pen of Arthur Train. Not only did he always win during the course of several thousand words, without commercials, but he did so with style and class. But his days, like those of *The Saturday Evening Post*, were already numbered when Arthur Train wrote, and the ranks of sole practitioners will be diminishing at an accelerating rate in the years ahead.

Another movement that is upon us — that of specialization — is one reason. For those problems that do still require hand-crafted, individually-tailored attention, specialists are already called upon almost exclusively by those in the corporate world, and specialists will gain an increasing monopoly on that world in the future. This movement, and the necessity for larger capital investments in equipment and in continuing legal education, have already reduced the numbers of sole practitioners to about thirty per cent of the private lawyers in practice. The trend will surely continue.

Indeed, the increasing economies of scale will provide a substantial impetus not only for larger law firms than now exist, but for multi-office firms throughout the country. At least one firm is now in the process of expanding around the country, and my own guess is that there will be many others before long. Whether we will have the counterpart of the big seven in the accounting world — huge organizations with offices in every state — is less clear, but it may well happen.

Against this background, what can be said of the ways in which our profession will be regulated in the future?

The Character of Regulation of the Legal Profession

At the extreme, one can imagine a complete socialization of the profession. This approach might, although not necessarily, involve all lawyers as civil servants. A less radical step has been suggested recently by Judge Marvin E. Frankel in *The New York Times Magazine*.[3] He proposes that:

> We should move toward a kind of National Legal Service that will make the assistance of lawyers freely and equitably available to all, without regard to ability to pay, as a public service. . . . The proposed National Service would not mean the drafting of lawyers into the public service. Many, perhaps most, could remain in private practice to be compensated with public money. There are enormous problems, to be sure. The stink of medicaid and medicare is not ended. Our prejudices, not unfounded, against

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[3] Frankel, *An Immodest Proposal*, N.Y. Times, Dec. 4, 1977, § 6 (Magazine), at 92, 97, col. 2.

> civil servants are vast. But we won't give up on the public provision of medical services. And there is no majority yet for returning the police, the courts, and the sewers to the realm of private enterprise. If, as we claim, the administering of justice is public business, we ought to deal with the consequences and the fair implications.

As Judge Frankel indicates, there are enormous problems in this approach, though he thinks they are manageable. At the very least, we should try to learn something from the struggles within the medical world and the enormous costs that are now involved in that world. One obvious remedy, so far evaded by the medical profession, is to put some cap on the fees charged by practitioners. The notion that there should be some limit to the amount that a doctor can receive for an individual service does not seem to me heretical, though many doctors would view it that way, as would many lawyers if it were applied to the legal profession.

My own guess is that our profession will be clever enough to avoid the most extreme forms of regulation by government, though I must admit that there is not too much past evidence on which to base such confidence. Our profession has been extraordinarily resistant to the new forms of delivering legal services such as legal clinics and group and prepaid plans and, of course, to any form of advertising.

The struggle in recent years over advertising is a prime example of the dangers of resting regulation exclusively within the profession itself. In the name of protecting the public, restrictive limitations were established that effectively precluded the public from information vital to informed decisions on how to handle legal problems and at what cost.

My own view has always been: Let's not call it advertising, but rather access to information, and regulate the dissemination of that information only to the extent necessary to preclude false and misleading material. This view is urged not as a matter of constitutional law, though the Supreme Court has now spoken against the bar on that point,[4] but rather as a matter of the obligation of a public profession to ensure an informed public.

The lack of adequate enforcement of the Code of Professional Responsibility by many bar associations is an even more serious cause for concern. Unless a lawyer is caught with his or her hand squarely in the pocket of a client, discipline is rarely imposed. In this area, as in others, unless our profession substantially strengthens its own efforts, government will intervene with increasing regularity.

The most significant area of all, in my view, involves the professional obligations of attorneys to the public. This, in turn, leads to the third cluster of my concerns about the roles of lawyers in the future.

The Character of Professional Obligations of Lawyers

For some time now, I have been whining to various groups in the organized (and disorganized) bar that lawyers have a professional respon-

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[4] Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

sibility to provide some of their time, *pro bono publico*, to the otherwise unrepresented. This claim is based upon Canon 2 of the American Bar Association's Code of Professional Responsibility, which provides that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Admittedly, the Code now sets no standards for how a lawyer should meet that responsibility or what happens if she or he fails to meet it. I am now a member of an ABA committee charged with revising the Code over the next three years, and one of our important tasks is to focus on just this area.

More fundamental, my convictions about the responsibilities of lawyers — why they *are* different from carpenters — are rooted in my view that every lawyer is part of the legal system with an obligation to help make that system work. It is a system that the residents of this country have no choice about. They must use it. They must live under the law. Society as a whole, through government, requires this commitment of all citizens. In return, the opportunity to use the legal system is an inherent right of citizenship. If political liberty means anything at all, it must mean that.

For the vast majority of people, this right, this aspect of liberty, can only be realized if there is access to a lawyer. Lawyers make the legal system work. We have a monopoly on legal services, and with the monopoly comes an obligation to serve the public. In my view, the operational consequences of that obligation are a requirement to provide some representation for those who will otherwise be unrepresented.

Equally important, society as a whole has an interest in the sound working of the legal system. Society as a whole has an interest in the rules being followed by all persons and entities, regardless of economic resources. If this does not happen, if some people, including those in government, are effectively outside the law because others do not have the economic resources to bring them to account, then the whole system is skewed.

These are the reasons why the legal profession has an obligation to ensure that legal services for the poor are available. These are also the reasons why legal services are different than other necessary services provided by government — services for which one might argue the poor should be able to take the equivalent value in cash.

Much more federal funding is needed for legal assistance to the poor. It is my hope and expectation that over the next few years the funding will increase substantially. Legal assistance will never be available to all who need it, however, unless private lawyers recognize that they *are* different than carpenters and that they should, therefore, provide some of their time and talents *pro bono* to that end. Many do so now, but a minimum amount of *pro bono* service is needed from *all* private lawyers.

In the main, bar organizations have been extremely receptive to encouraging their members to provide service for the poor and other unrepresented groups, and many have developed various techniques to facilitate that work. When I have gone further, however, and suggested some minimum standard of required service — such as five percent — objections have been heard. Few have been as sharp as one from Mr. Sidney Rubin,

the immediate past president of the Lawyers Association of Metropolitan St. Louis, who wrote:

> In 1776 the colonies fought the Revolutionary War because they objected to being subservient to the Crown. Later, when this country was formed in 1789, we had the sad situation of certain people, owning other human beings, i.e., slaves. These chattels were required to serve at the beck and call, and at the pleasures of their owners. In 1860, another war was fought, as you will remember from the history books which resulted in the Thirteenth Amendment to the Constitution of the United States being adopted. Obviously, the persons who were chattels or slaves then became free individuals, no longer subject to the control of private individuals. However, harbingers of Mr. Ehrlich grew from seeds sown in that war; a number of forms of indirect servitude have turned up in our lives, not from individuals forcing it upon us, but by the ever-expanding entity called *Government*. . . . Does not the Thirteenth Amendment apply to lawyers? . . . Mr. Ehrlich owes the bar a quick apology for his inane remarks and quick withdrawal of his plan, but don't bet on this happening.[5]

I agree of course that it won't happen, but this diatribe gives you some sense that the bar is not without its objectors to my suggestions. I should add that, insofar as I can tell, our profession does do more public service than any other occupation. Its members give enormous amounts of their time and talents to helping those in need without cost.

Many lawyers, however, do no public service work, yet they share in the monopoly on the provision of legal services maintained by the profession. In my own view, unless our profession as a whole is willing to accept and implement a plan to ensure that no one in this country shall be denied legal assistance because of lack of resources, the government that Mr. Rubin fears most will make us do it.

As a first step in the process, we will have to do what our profession has long resisted doing — develop some set of standards for decent legal care for average citizens. I spent some time looking at the standards of decent care that have been established in the fields of education, health, housing, and nutrition and, on that basis, do not suggest that the task will be easy. There are no convenient counterparts in legal care to the necessary numbers of vitamins, minerals, and quantities of protein. Nor are there obvious equivalents to the smallpox injection. But we can and will develop over the next decades basic guidelines for what average citizens, both individually and in aggregates, need by way of legal care.

My own hope is that our profession will take the lead in developing these standards and in designing arrangements to implement them. Elsewhere I have proposed suggestions along these lines. At this point, I only

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[5] Rubin, *The Practicing Attorney Gets Another Slap in the Face, Or Take Thomas Ehrlich Please*, St. Louis Daily Record, Oct. 11, 1977, at 1, col. 1.

underscore my view that unless private lawyers take the lead, the government will.

The Character of Law Training

Finally, a few words about legal education in the future. It somehow seems harder for me to predict what will happen in the realm of law training for non-lawyers than in that special world of the law schools, so my discussion will begin with the easier wicket.

It is largely an historical accident that law training, in the main, is currently confined to those who would be lawyers. The shift of legal education from the undergraduate level to professional schools at the turn of this century has meant that, with a few important exceptions, no one but lawyers knows anything about the law beyond the level of fifth grade civics. This surely must and will change. Indeed, the change is already well underway. A good many colleges now offer some exposure to the legal system and its limits for undergraduates, and many elementary and secondary schools are now including law training as part of their curricula. That trend is an important one and one that should continue. No one wants to turn the country into a nation of lawyers, though many from de Tocqueville on have accused America of being just that. But exposure to how the legal system works, to what it can and cannot do, deserves the time and attention of every citizen. Indeed, this country is virtually alone in denying this training to its citizenry, while at the same time asking them to govern.

Predictions about law schools are harder, perhaps because it seems to me so clear what should happen. Yet the changes I thought certain a decade ago are hardly further along today. I may just be impatient, but when one looks at the major shifts that have taken place in lawyering over the past century, few of them, if any, have been reflected in shifts in legal education. Given that gloomy history, what chance for change is there in the future?

When my good friend and colleague Herbert L. Packer and I wrote a book entitled *New Directions in Legal Education*,[6] the two dominant themes for the future that we stressed were diversity and the need to tie lawyer training more closely to lawyer tasks. We suggested that the monolithic lockstep pattern that has so dominated American legal education since Dean Langdell had his way at Harvard should be broken. We urged that different schools concentrate their resources on different needs to reflect the widely varying patterns of legal practice. I am confident now, as I was then, that the prescription is accurate. I am less clear, however, that it will soon come to pass.

More recently, I tried to sell this approach when helping the University of Hawaii to design a new law school. Former Dean Bayless Manning and I proposed that the school should begin solely with a third-year program that focussed on particular needs and strengths in the Hawaiian Islands.[7]

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[6] H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972).

[7] Ehrlich & Manning, Programs in Law at the University of Hawaii (Dec. 1970).

We urged that the school accept students from other schools after their first two years and build a first-rate faculty around four key areas of particular Hawaiian concern. In this way, we suggested, a capable faculty and student body with substantial research capabilities could be fashioned at relatively little cost. But the legislature of Hawaii decided otherwise and I received another lesson in the difficulties of change in legal education.

The second theme in the Packer-Ehrlich book concluded with the proposal that the standard law school cirriculum be reduced to two years, and that after a few years of practice lawyers be encouraged to return to law school to gain some training in what had become their specialities — so often by accident rather than by design. In a meeting of some seventy-five law school deans, the proposal garnered a rousing two votes, mine and one other. (Lesson number two.)

But hope springs eternal, and it is still my belief that change is in the offing in legal education. If faculty members and the bar cannot be moved, students may do better. Over the past decade, I have been struck by how many innovations in the law have been shaped by law students. All of us know the influence of law reviews — law is the only profession in which students are in sole charge of professional journals and the scholarship published. But there are other and more recent examples.

Let me cite only two — the growth and development of public-interest practice, and clinical training. Public-interest practice exists both in firms devoted exclusively to that work and in private firms whose lawyers provide some of their time *pro bono publico*. In major measure, public interest practice was promoted by law students who demanded something more of their profession than solely serving fee-paying clients — students who believed that the profession does have an obligation to represent the unrepresented, that a monopoly on the delivery of legal services carries with it a responsibility to serve the public interest. Students imposed requirements on law firms and the firms responded. In part, of course, the great demand for able students was behind the response. But it was more than that. The firms knew the students were right.

Similarly, the dominant pressures for clinical training in law schools have been from students. The Cleveland-Marshall College of Law has been one of the leaders in the development of first-rate clinical courses. Well-designed and well-taught, these courses provide a vital dimension to the law curriculum that has been too long absent.

A more difficult move, but one that must come, is the introduction of training in aggregation and mass-production — what I have suggested will be the dominant new trends in lawyering over the next decades. When the time comes, I hope those of you who are now students will also push the legal profession, law schools, and the law generally. They can use the pressure.

Finally, I make a special plea to law students. One of the glories of our profession is the opportunity to do many different types of jobs over the course of a lifetime. Most of those in law school have a half-century or more in which to do some professional gearshifting. I, for one, hope you will not be afraid to do so. In the last decades I have heard and

reheard two tales that trouble me greatly — and the two are closely related.

The first comes most commonly from middle-aged and seemingly successful lawyers. Most are partners in major firms. They struggled hard to achieve what they have achieved, and now they ask — openly if they have the courage, to themselves in all events — is this all there is to my professional life as a lawyer? Is this all I can look forward to for the next twenty-five to forty years? The answer, too often, seems to be yes, that is all there is. For one reason or another they have become locked into careers that provide inadequate personal satisfaction. They are convinced, rightfully or otherwise, that they cannot escape.

The other tale comes from law students considering their first full-time jobs in law. Many seem to feel they must get on and stay on a narrow treadmill. It just isn't so. The law offers an extraordinary range of opportunities to do what you want to do in ways that provide real satisfaction. Don't settle for less, in your first job and in all your jobs. Don't take the easiest, most comfortable position unless you are sure it is really what you want.

The law offers various paths to professional satisfaction. This satisfaction must come in part from a mastery, through experience, of the lawyering abilities initially introduced in law school. Law school teaches the techniques of legal analysis and some of the basic skills of the profession.

Law schools cannot, however, provide their students with many of the dimensions that mark the first-class lawyer.

Good judgment is the most obvious dimension that law school does not teach. The ability is rooted partly in instinct, but much more in experience. It is the artisan dimension of the lawyer — the counterpart of the sense of proportion, balance, and beauty that makes one say about a superbly crafted piece of carpentry that it is also a piece of art.

Integrity, no less than good judgment, is also essential to the first-class lawyer. Integrity obviously extends far beyond knowing that one should not steal from one's clients. The lawyer of integrity should be much more than a "hired gun" — an advocate who zealously promotes a client's interests regardless of the cost to society.

But good judgment and integrity are not all there is. The margin of difference is what, to me, makes lawyering more than just a craft — joyful a craft as it can be. The difference is people.

Some lawyers, it is true, work solely with books, with words, with ideas — and you may decide to be among them. But for most in the law — working with people, easing people's problems, above all, helping people as individual women and men who need help — those are the real rewards of the job; they make lawyering worthwhile and are what it is all about.

Three years of law school devoted to legal reasoning and substantive learning have so little to do with the human dimensions of being a lawyer that those dimensions will almost inevitably seem less important unless you take special care. The law may come to seem arid and abstract, remote from reality. The process by which exciting human

dramas become plaintiffs vs. defendant — or worse, *P* vs. *D* — the process by which all the blood is drained from a human concern when it is subjected to analysis as a "legal problem" — that process can be contagious if you are not careful. Without some attention to the matter, you can begin to view the human dimensions of a problem as irritating irrelevancies rather than what makes the problem important.

The pressures on a lawyer of the adversary system promote this tendency. The lawyer's job is to defend her or his client, to analyze the problem objectively and then to represent the client's interests with complete devotion. Unless the lawyer is careful, the result can be to overlook her or his responsibilities as an adviser to another human being rather than as an advocate or an analyst of abstract problems.

I urge all law students to take all possible sensitizing medicine. I urge you to get out of the classroom as soon and as often as you can and to talk with real people about their problems with the law, to spend time helping to learn and listen to what people — particularly the poor and the middle-class — think about law and lawyers. Come to know how scared many people are of legal institutions. Come to see that for most people lawyers — not courts or legislatures — are the law.

How can you do this — how can you come to understand the ways in which people view the law? One way I can vouch for is to spend some time in the legal aid offices here. You will gain a vivid sense of how "legal problems" affect people's lives, how a "breach of warranty" in the sale of an automobile may result in the loss of a job, or a "landlord-tenant" dispute may mean that a family goes without housing. You will learn how legal rules and procedures, logically defensible in a classroom debate, place unfair burdens upon poor people.

You will gain some sense of just how frightening the law — and lawyers — can be, how important it is for lawyers to understand this, and to treat their clients as people rather than abstract legal questions. Being a lawyer is more — much more — than doctrine in books and arguments in courtrooms. It is helping people and having the compassion and the concern to want to help them. Perhaps one can be an effective carpenter without those qualities, but one cannot be an effective lawyer without them.

But there is even more — and it is the more that marks the profession of law as different, not only different than crafts such as carpentering, but unique in our society. It is the basis for my belief that every private lawyer has an obligation to provide some services without fee to the poor. It is also the basis for my conviction that every person is entitled to minimum legal care without regard to economic resources.

I care particularly about legal services for the poor. That is my own world these days. I also know that it is just one of many careers that can offer great satisfaction. Law students have enormous opportunities ahead. They also, in my view, have obligations as lawyers to use those opportunities. Make good use of them.